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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 569

MUNICIPAL ACCEPTANCE CORPORATION,
A CORPORATION,

Petitioner,

vs.

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, UNITED STATES OF AMERICA, and ROY F. YOKE, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, IN THE STATE OF WEST VIRGINIA,

Respondents.

REPLY OF PETITIONER TO BRIEF FOR ERNEST K. JAMES, RESPONDENT, IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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STATEMENT

While strictly speaking no reply is necessary to the brief just mentioned, yet since we believe that respondent in his statement fails to set out, and in his argument and conclusion fails to meet, the questions actually before this Court upon the petition and record, we submit the observations which follow solely as a means of keeping before this Court what actually is involved herein.

ARGUMENT

We find nothing in the brief in behalf of the State Tax Commissioner which meets or answers what is stated in subdivision VI, pp. 7-15, of the petition herein. Nor do we find anything in respondents' argument on the merits (which seems to be based entirely upon *Barwise* v. *Shepherd,* 299 U. S. 33) which is not dealt with on pages 53-4 of petitioners' brief in the Supreme Court of Appeals of West Virginia, lodged with the Clerk of this Court as an exhibit to the petition herein. We submit, however, not only that respondents' argument leaves untouched the portions of the petition here and of the brief below just cited, but that inherently, and considered by itself, it is unsound.

The West Virginia taxes, the lien incident to which the decision of the Supreme Court of Appeals of West Virginia seeks to attach to petitioner's property, are excise taxes imposed upon the privilege of carrying on the business of selling tangible personalty. They are not taxes on property. They are not taxes on contracts made by the Colliery or upon the subject matter of such contracts. Even if construed as taxes upon the sale of property or upon the transactions constituting such sale, they cannot be construed, upon any theory, as having been intended to reach petitioner's property.

These considerations are immaterial in determining whether the taxes are within the state taxing power as distinguished from other powers of the state government (*Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 508 (1937)) but they are of the utmost importance in testing the relationships of the parties to the subject matter. *Barwise* v. *Shepherd,* 299 U. S. 33 (1936), dealt with a Texas tax on the production of oil. Obviously it was an

excise tax, not upon the oil or the land from which it came, but upon the privilege of producing it. The holding of the case (299 U. S. 40) was that any contract relating to the production of oil was made in subordination to the power of the state to tax the privilege, and apportion the tax between the parties exercising the privilege in proportion to their respective interests; and that the state's power thus to direct the incidence of the tax and shift part of its burden from lessee to lessor was not affected by the fact that by the law in force when a lease was made the entire tax was on the lessee.

This record presents no such case. Petitioner and the Colliery were not engaged in any common enterprise, or parties to any contract providing for the carrying on of a business, the privilege of conducting which was subject to the state's taxing power (whether reserved or exercised). It cannot be said that the contract of conditional sale of the engines was made in subordination to the power of the state to impose a tax on the buyer's privilege of selling coal. This might be said of the state's power to tax the engines themselves, or the respective property rights of the parties therein, and apportion the resulting tax between buyer and seller. It might also be said of the state's power to tax the sale of the engines themselves, and apportion that tax between buyer and seller. It cannot be said of the state's power to tax the buyer's privilege, with which the seller had no connection, of selling some other property or of engaging in some other business.

The resulting direct invasion and destruction of petitioner's ownership of the engines becomes more rather than less apparent when considered, as it must be, with the decree of March 10, 1939 and the construction of that

decree by the Supreme Court of Appeals, as the sole basis of the inference that the legislature of West Virginia by imposing the gross sales tax and other privilege taxes on the Colliery intended thereby to reach petitioner's property. If the Supreme Court of Appeals is right in its construction of the March 10, 1939 decree, then that decree held that the Colliery was the owner of the engines, "subject to" the conditional sale contract, whereas the law of West Virginia as construed in *Moran* v. *Coal Co.*, 10 S. E. (2d) 578 (1940), is that the seller remains the owner subject to divestiture on payment of the balance of the purchase price. If the Supreme Court of Appeals is correct in its construction of the March 10, 1939 decree, then that decree held that the Colliery was the owner, "subject to" some sort of lien, whereas the law of West Virginia is that the Colliery and its receiver, until the payment of the purchase price, had only the right to obtain title by such payment and no lien of the state for taxes payable by the Colliery could attach to anything except that right. The petitioner was not required to read such wholly erroneous, illegal and unconstitutional construction into a decree which but for that construction was in its favor and not against it. It was not required, by an appeal from such decree, to assume that anyone would have the hardihood to ask for such construction, or that the Supreme Court of Appeals of West Virginia would sustain it.

Moreover, the brief for respondent State Tax Commissioner ignores the fact that on the other branch of the case (as carefully pointed out in our petition, pp. 7-8) the decree of August 23, 1939 adjudicated petitioner's ownership of the engines and equipment to be paramount to any lien of the United States for taxes. The United States did not appeal from that decree, nor does it now oppose the issuance of writ of certiorari. The Supreme Court of

Appeals of West Virginia was in error as to the effect of the decree of March 10, 1939 as between petitioner and respondent State Tax Commissioner; but even if it had not been, it was manifestly in error on the other branch of the case, and the writ should issue herein accordingly.

WHEREFORE, the petitioner prays as in its petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia it heretofore has prayed.

Respectfully submitted,

MUNICIPAL ACCEPTANCE CORPORATION,

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December 9, 1940.